BANK BUMIPUTRA MALAYSIA BHD

v.

SRI KAJANG SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: C 4050-1985]
30 NOVEMBER 2001

CIVIL PROCEDURE: *Costs - Getting-up fee - Judge reviewing registrar's decision - Getting-up for defending - Whether complex issues raised - Whether statement of defence required extensive getting-up*

CIVIL PROCEDURE: *Costs - Getting-up fee - Judge reviewing registrar's decision - Getting-up for dismissal action - Whether registrar failed to consider relevant factors in reaching decision - Whether interference with registrar's award warranted*

The fourth defendant had earlier applied for and been granted an order dismissing the plaintiff's action against him, and for the costs of the application and of defending the action to be paid by the plaintiff. He then filed his bill of costs claiming RM30,000 as costs for getting-up, and the taxing senior assistant registrar ('SAR') taxed it down to RM8,000. Both parties applied for a review by the SAR of her decision resulting in the costs being reduced to RM4,000. The fourth defendant, being dissatisfied with the decision, applied for a review by a judge of the taxation as to getting-up.

Held:

[1] The defendant's previous solicitors had not needed to do much getting-up, whether as to law or as to fact, to prepare the statement of defence as it was very brief and did not raise any complex issues. Hence, although the learned SAR may have appeared not to have given regard to the relevant considerations concerning the getting-up for defending, in actual fact, the amount could not have been very much. (p 342 c-e)

[2] For the fourth defendant to succeed in his application, he would have to show that the conditions laid down by authorities to entitle a defendant to have an action dismissed for want of prosecution had been fulfilled, such as inordinate and inexcusable delay, prejudice and so on, and not simply the fact of failure on the plaintiff's part to take out a summons for directions. The importance of the application lay in the prejudice to the fourth defendant if the action were to continue, which is, after all, part of the basis for a case of dismissal for want of prosecution. Therefore, the learned SAR failed to give regard to all relevant circumstances by failing to appreciate those factors. (pp 343 c & h-i)

Per curiam:

[1] The plaintiff submitted that although the action had commenced within the High Court, by the time the dismissal application was heard, by reason of amendment of limits of jurisdiction, it had fallen within the jurisdiction of the Sessions Court, and therefore, the Sessions Court scale of costs should be applied following O. 59 r. 27(6) of the Rules of the High Court 1980. This was not justified as O. 59 r. 27(6) does not apply where, as in this case, the action, when brought, was brought in the High Court and could not have been brought in the Sessions Court, and furthermore, it only applies to a plaintiff and not to a defendant. (pp 344 f-i & 345 a-b)

[Order of SAR amended; getting-up fee increased to RM10,000.]

Case(s) referred to:

Bank Negara Malaysia v. Gerald Glesphy [1992] 1 CLJ 15; [1992] 1 CLJ (Rep) 10 ***(refd)***

Gooi Hock Seng v. Chuah Guat Khim [2001] 1 CLJ 583 ***(refd)***

JP Finance (M) Bhd v. Tanswan Brothers Enterprise Sdn Bhd [1994] 3 CLJ 318 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 59 r. 27(6)

Subordinate Courts Rules 1980, O. 25 r. 1(4), O. 48 r. 12

For the plaintiffs - Tony Dana; M/s Wan Marican Hamzah & Shaik
For the 4th defendant - Malcolm Murphy; M/s Cheah Teh & Su

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Mohamad J:

The plaintiffs filed their writ in this action on 18 July 1985 with a statement of claim endorsed. It was a claim arising from two overdraft facilities totalling RM150,000 granted to the first defendant company in 1981 and 1982 and alleged to have been guaranteed by the three other defendants by two letters of guarantee given in 1981 and 1982. The plaintiffs alleged default in repayment, recall of the facilities, and a debt of RM187,227.56 as at 30 June 1985. They claimed that sum and interest from all the defendants.

The defendants filed their statement of defence on 14 November 1985.

On 18 October 1986 the plaintiffs filed an amended statement of claim. As far as the fourth defendant is concerned, it was now alleged that he was the guarantor in respect of one facility only, which was for RM70,000, the other being for RM80,000. The claim against him was now RM87,372.85 as at 30 June 1985 and interest.

Ten years later, on 14 November 1996, the fourth defendant filed an application that the plaintiffs' action against him be dismissed pursuant to O. 25 r. 1(4), which allows a defendant to apply for an order to dismiss the action if the plaintiff does not take out a summons for directions in the prescribed time. The fourth defendant also prayed that the costs of the application and the costs of defending the action be paid by the plaintiffs.

The learned senior assistant registrar heard the application on 21 February 1997, and on 6 May 1997 he made orders in terms of the application, that is to say, he dismissed the plaintiffs' action and ordered that the fourth defendant's costs of the application and of defending the action be paid by the plaintiffs.

On 16 October 1997 the fourth defendant filed his bill of costs in which he claimed RM30,000 as costs for getting up. The taxing senior assistant registrar on 3 December 1997 taxed it down to RM8,000. Both parties applied for a review by the taxing senior assistant registrar of her decision in respect of the costs of getting up. After the review, on 24 March 1998 she reduced the amount from RM8,000 to RM4,000.

The fourth defendant, being dissatisfied with the decision, applied for a review by a judge of the taxation as to getting up. This judgment is on that application.

It is clear from the grounds of decision of the senior assistant registrar that the amount of RM4,000 was for getting up both in respect of the dismissal application and in respect of defending the action, but it is not stated how much is for each. It is also clear that the circumstances that she had regard to in arriving at the amount of RM4,000 were circumstances in respect of the dismissal application. As to defending, she merely said in para. 11 of her grounds that she had also taken into consideration the costs of defending, which she said could not be equated with the costs of defending in a full trial because the action had been dismissed without a trial. I would conclude that in her mind the costs of defending would be a minor portion of the sum of RM4,000.

Because a major complaint made by the fourth defendant in the review is that the learned senior assistant registrar failed to have regard to the relevant considerations in respect of getting up for defending the action, I find it would not be convenient to reach a decision on the review without apportioning the amount of RM4,000. I shall proceed on the assumption that the learned senior assistant registrar would have assigned RM1,000 to defending, leaving RM3,000 for the dismissal application.

As regards costs of defending, the thrust of the fourth defendant's argument is that his previous solicitors would have done much getting up in order to prepare the statement of defence because the statement of defence shows, it was submitted, that the issues raised were complex and were not run-of-the-mill. It was further argued that the subject of guarantee required specialised skill and knowledge on the part of the solicitors.

The statement of defence is a very brief one and does not fully occupy even two pages. It was for all the defendants. They averred that the plaintiffs failed to keep proper accounts, failed to credit payments, failed to give receipts for moneys received, and that the facility had been fully settled. The guarantor-defendants additionally averred that they never executed any guarantee for RM150,000, that they gave a guarantee for RM100,000 only but the plaintiffs falsely induced them to sign a guarantee for RM150,000. Those are not at all complex issues and they are not issues that are peculiar only to the law of guarantee. I do not believe that the defendants' previous solicitors needed to do much getting up, whether as to law or as to fact, to prepare such a statement of defence.

So although the learned senior assistant registrar may appear not to have given regard to the relevant considerations as regards the getting up for defending, in actual fact the amount could not have been very much. So if she had in mind RM1,000 for it, I should think that it was more than fair.

But having said that I must say that at the close of submission I was left with a distinct impression that an amount of RM4,000 for getting up for the dismissal application and for defending was inadequate. Having studied the learned senior assistant registrar's grounds, I think that is because she did not realistically have regard to the circumstances set out in para. 1(2) of Part X of Appendix 1 to O. 59. She was aware no doubt of those circumstances and she does say that she did have regard to them, but she does not appear to have appreciated the actual circumstances of this case. She seems to consider that the dismissal application was a simple application that only required proof of failure on the plaintiffs' part to take out a summons for directions. She says that the application was very important to the fourth defendant, but her reason is only that if he succeeded then the action would come to an end.

Let me set out the realities of the application. In his affidavit in support of his application, the fourth defendant claimed inordinate and inexcusable delay in prosecuting the action, considering that the guarantee was executed more than fifteen years previously. He said that since the issue of the writ the limitation period had expired, meaning, I suppose, that if the limitation period had not expired there would be no point in allowing his application because if the action were dismissed the plaintiffs could still file a fresh action. The

fourth defendant further claimed that the inordinate delay had prejudiced him because, with interest, the plaintiffs' claim of RM87,372.85 would have increased to RM300,000 although he had signed a guarantee for RM70,000 only. He said he would be prejudiced in not being able to recall events of fifteen years ago and also because one of the other guarantors had since passed away and there would be one person less for him to claim contribution from in case the plaintiffs succeeded in their claim. Finally he said that he was already seventy-seven years old and did not wish to have the plaintiffs' claim hanging over his head indefinitely.

It is clear, therefore, that for the fourth defendant to succeed in his application, he would have to show that the conditions laid down by authorities to entitle a defendant to have an action dismissed for want of prosecution had been fulfilled, such as inordinate and inexcusable delay, prejudice and so on, and not simply the fact of failure on the plaintiffs' part to take out a summons for directions.

It is also clear that the importance to the fourth defendant in having the action dismissed lay not so much in the fact that he would be free of the action if it was dismissed as in the difficulties that he would be faced with were the action to proceed and to succeed.

The fourth defendant's application was vigorously opposed by the plaintiffs. The plaintiffs denied there was inordinate and inexcusable delay. They attempted to explain the reason for the delay, which had to do with a judgment in default of defence entered against the fourth defendant (which was subsequently set aside) and the plaintiffs' pursuit of bankruptcy proceedings against him. The plaintiffs also said that the delay was contributed to by the fourth defendant. The plaintiffs argued that the delay had not prejudiced the fourth defendant. There were altogether eight affidavits, four on each side.

On 21 February 1997 the senior assistant registrar heard a lengthy argument. The notes, in brief form, occupy four foolscap pages. The argument might have lasted several hours.

It was therefore not such a simple application as the learned senior assistant registrar seems to have thought. Neither was it merely for the reason that the action would come to an end that the application was important to the fourth defendant. The importance lay in the prejudice to the fourth defendant if the action were to continue, which is, after all, part of the basis for a case of dismissal for want of prosecution. In my opinion, therefore, the senior assistant registrar failed to give regard to all relevant circumstances by failing to appreciate those factors and for that reason I ought to interfere with her decision.

Learned counsel for the fourth defendant has tendered to the court a copy of the records of taxation proceedings in High Court Kuala Lumpur (Commercial Division) Civil Suit No. D1-22-2751-1987, which proceedings were concerned with the costs of the second defendant there of his application to dismiss the plaintiffs' action under O. 34(2) for the plaintiffs' failure to set the action down for trial within the period fixed by an order made on a summons for directions. There was only the second defendant's affidavit because the plaintiffs did not file any affidavit in opposition, and the hearing took only fifteen minutes. On a review, the learned senior assistant registrar maintained his award of RM2,000 for getting up. The learned judge, on a review, allowed RM4,050 on the second defendant's entire bill of costs, including RM336 allocatur fee. Learned counsel for the fourth defendant here, speaking from personal knowledge as counsel for the second defendant in that case, said that the learned judge increased the getting up to RM3,000. Although this is not apparent from the records, considering the total of RM4,050 and the other items in the bill of costs, I find it probable that the getting up was RM3,000 of the sum of RM4,050.

Comparing the circumstances of this case and that case, I would put the getting up in this case at three times that in that case. I would therefore award RM9,000 for getting up for the dismissal application. Add to that RM1,000 getting up for defending, the total is RM10,000.

Learned counsel for the plaintiffs submitted that the action, although, when commenced, was within the jurisdiction of the High Court, by the time the dismissal application was heard, by reason of amendment of limits of jurisdiction, had fallen within the jurisdiction of the Sessions Court. He therefore submitted that the action should have been transferred to the Sessions Court but, since it was not, the Sessions Court scale of costs should be applied. According to O. 48 r. 12 of the Subordinate Courts Rules 1980, considering that the plaintiffs' claim was for the principal sum of RM87,372.85, the fixed costs of suing or defending are only RM1,250. Therefore it was submitted that RM4,000 for getting up in this case was very reasonable.

For contending that the fourth defendant's costs should be given as if this had been an action in the Sessions Court, learned counsel for the plaintiffs relied on the Supreme Court decision in *Bank Negara Malaysia v. Gerald Glesphy* [1992] 1 CLJ 15; [1992] 1 CLJ (Rep) 10 which gave effect to O. 59 r. 27(6) of the Rules of the High Court 1980. That rule provides, *inter alia*, that "if any action is brought in the High Court, which would have been within the jurisdiction of a Subordinate Court, ... the plaintiffs shall not be entitled to any more costs than he would have been entitled to if the proceedings had been brought in a ... Subordinate Court ...". That rule is only applicable where a plaintiff brings an action in the High Court which, at the time it is brought,

would have been within the jurisdiction of a subordinate court. It does not apply where, as in this case, the action, when brought, was brought in the High Court and could not have been brought in the Sessions Court. Furthermore, it applies only to a plaintiff and not to a defendant. So there is no justification for deciding the costs in this case with the guidance of any costs that would have been obtained in a subordinate court.

Learned counsel for the plaintiffs also relied on *JP Finance (M) Berhad v. Tanswan Brothers Enterprise Sdn Bhd* [1994] 3 CLJ 318, where the plaintifffs obtained summary judgment against one of the defendants from the senior assistant registrar but the defendant appealed to the judge and won. VC George J allowed the defendant RM2,000 for getting up the summary judgment application and RM1,500 for getting up the appeal. In my opinion that case is not an appropriate comparison for the present case because in allowing those amounts the learned judge centred his considerations on the fact that item 1(c) of Appendix 2 to O. 59 provides that, in a claim for a debt or liquidated demand, in respect of summary judgment proceedings the successful plaintiff is allowed fixed basic costs of RM350. It would be wrong in principle to determine the costs for a defendant who succeeds in having an action dismissed for want of prosecution by what a successful plaintiff would have gotten for a summary judgment application in view of the said item 1(c).

The nearest case that I have for comparison is Civil Suit No. D1-22-2751-1987 that I have mentioned. I do not propose to examine each of the other cases cited by both sides because it is difficult to use them as comparison, the circumstances being different. There is always something to be said for and against reliance on them. Take for example another case relied on by learned counsel for the plaintiffs for saying that the quantum of RM4,000 in this case is reasonable. It is *Gooi Hock Seng v. Chuah Guat Khim* [2001] 1 CLJ 583. It was a running-down action, considered to be the simplest of cases. Damages of RM61,000 were awarded. The plaintiff withdrew his appeal to the Federal Court. The registrar awarded the defendant RM5,000 for getting up of the appeal, with which award the Federal Court declined to interfere. Although the defendant would have done getting up in preparation for the appeal, most of it would have been ground already covered in the court or courts below. The defendant's getting up for the appeal to the Federal Court would have been much less than the getting up in this case.

Accordingly, I allow RM10,000 for getting up for the dismissal application and for defending. The allocatur or certificate of the registrar shall be amended accordingly.